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LABOR & EMPLOYMENT DEPARTMENT

ALERT

Employees Can Sue For Retaliation Without Having Engaged in Protected Activity

By Catherine T. Barbieri and Erin T. Fitzgerald

On January 24, 2011, a unanimous eight-member panel of the U.S. Supreme Court held that an employee who has not engaged in protected activity is permitted to proceed with a retaliation claim under Title VII of the Civil Rights Act of 1964 (Title VII)—where the employee is subjected to retaliation due to protected activity engaged in by another individual and is in the zone of interests protected by Title VII.

In *Thompson v. North American Stainless, L.P.*, the plaintiff, Eric Thompson, was employed by the defendant, North American Stainless (NAS) and was terminated three weeks after his fiancé, who also worked for NAS, filed a charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC). Thompson filed a suit alleging retaliation in violation of Title VII. The district court granted summary judgment to NAS on the grounds that Title VII does not permit third-party retaliation claims. The U.S. Court of Appeals for the Sixth Circuit affirmed the district court's decision.

Justice Scalia delivered the opinion of the Court. Relying upon the Supreme Court's decision in *Burlington N. & S. F. R. Co. v. White*, 548 U.S. 53, 68 (2006), the Court read Title VII's anti-retaliation provision broadly to prohibit any employer action that might have dissuaded a reasonable worker from making or supporting a claim of discrimination. The Court explained that, because a reasonable worker might be dissuaded from engaging in protected activity if she knew her fiancée would be fired, Thompson's termination could constitute retaliation in violation of Title VII.

The Court also held Thompson could pursue a retaliation claim under Title VII because he was within the zone of interests protected by Title VII. The Court reasoned Thompson was an employee of NAS, and the purpose of Title VII is to protect employees from employers' unlawful actions. Additionally, the Court concluded that, because Thompson was the intended victim of the employer's retaliation, he was within the zone of interests protected by Title VII.

While the Court declined to adopt a bright-line rule concerning the relationships that would qualify for protection from third-party reprisals, it noted a close family relationship will almost always meet the standard. Conversely, a mere acquaintance will almost never meet the standard.

Retaliation claims are on the rise. On January 11, 2011, the EEOC announced in a press release that in 2010, retaliation charges for the first time surpassed race discrimination charges as the most frequently filed charge of discrimination. The Court's decision in *Thompson* will likely contribute to that trend as complainants pursue claims of third-party retaliation.

Given the increase in retaliation claims, employers must ensure their policies prohibit retaliation for engaging

in protected activity. Moreover, employers should tread carefully when considering taking an adverse employment action against an employee who may dissuade another employee from making or supporting a charge of discrimination.

For more information regarding the information in this alert, if you have any questions or concerns regarding potential retaliation claims or implementing non-retaliation policies, please contact Catherine Barbieri at 215.299.2839 or cbarbieri@foxrothschild.com, Erin Fitzgerald at 215.299.3832 or efitzgerald@foxrothschild.com or any member of Fox Rothschild's Labor & Employment Department.

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